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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Ventures Edge Legal PLLC,

10 Plaintiff,

11 v.

12 GoDaddy.com LLC,

13 Defendant.  
14

No. CV-15-02291-PHX-GMS

**ORDER**

15 Pending before the Court is the Motion to Certify Class of Plaintiff Ventures Edge  
16 Legal PLLC (Doc. 86).<sup>1</sup> For the following reasons, the motion is denied.

17 **BACKGROUND**

18 Microsoft sells an office-services product known as Office 365. This product is a  
19 software system that provides its buyers with various computer programs and  
20 functionalities. Consumers may purchase Office 365 directly from Microsoft, but  
21 Microsoft also authorizes other retailers to sell the product. In 2014, Microsoft and  
22 GoDaddy entered into a partnership that allowed GoDaddy to sell Office 365. GoDaddy's  
23 version of Office 365 aimed to serve the small business market. In its version of Office  
24 365, GoDaddy "consolidated setup, billing and support processes" to result in a  
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26 <sup>1</sup> Plaintiff seeks to seal Exhibit 15 to their Reply in Support of Plaintiff's Motion  
27 for Class Certification (Doc. 116). The Court entered a Stipulated Protective Order (Doc.  
28 56) as discovery was likely to produce information and documents that are normally kept  
confidential for competitive reasons. Defendant has stipulated to seal Exhibit 15. Because  
both parties are in agreement and the Court finds that the contents of Exhibit 15 fall  
within the ambit of the Stipulated Protective Order, the motion is granted.

1 simplified user interface specifically intended for small business customers. This  
2 simplified user interface offers a different configuration of Office 365 than that offered  
3 by Microsoft. Despite bearing the same name, Plaintiff alleges that Microsoft and  
4 GoDaddy's Office 365 Business Premium plans contain different functionalities. Some of  
5 the Microsoft functionalities are absent in GoDaddy's plan, and some functionalities are  
6 added to GoDaddy's plan that do not exist in the Microsoft version. For example, a  
7 GoDaddy purchaser of Business Premium received Microsoft Access—a Microsoft  
8 product not available for Microsoft Business Premium purchasers. On the other hand, a  
9 GoDaddy purchaser of Business Premium lacks access to Microsoft Sharepoint, Single  
10 Sign-In, among other capabilities—Microsoft functionalities that are available to  
11 Microsoft Business Premium purchasers.

12 GoDaddy markets and sells its version of Office 365 Business Premium to  
13 prospective customers in different ways. GoDaddy's marketing strategy focused on the  
14 accessibility of the Office 365 products and their use for small business owners.  
15 GoDaddy consumers can buy Office 365 products from the Office 365 landing page of  
16 GoDaddy's website, from the consumer's personal account, or by contacting GoDaddy  
17 customer support. GoDaddy supports an online chat function where customers can ask  
18 questions about products to company representatives. Customers can also make  
19 purchases of products through the assistance of the company representatives in the chat.  
20 GoDaddy's chat employees are trained on the functionalities of the product, and  
21 GoDaddy asserts that the functionalities of GoDaddy's Office 365 Business Premium  
22 including the differences in functionalities might be disclosed to customers during the  
23 chat. There is evidence that GoDaddy representatives do in fact disclose the different  
24 functionalities when asked. In Plaintiff's own conversations with GoDaddy  
25 representatives through the chat feature, GoDaddy representatives told Plaintiff that there  
26 were differences between the Microsoft and GoDaddy product and discussed which  
27 functionalities were not supported by GoDaddy. (Doc. 103). In Plaintiff's case, however,  
28 these conversations did not occur until after Plaintiff had already purchased GoDaddy's

1 product. Customers, however, may use the chat function prior to purchasing the product  
2 through the website or otherwise.

3 Plaintiff argues that GoDaddy's alleged failure to disclose these different  
4 functionalities on its website is an omission of a material fact, and therefore a violation of  
5 the Arizona Consumer Fraud Act (ACFA). Plaintiff seeks to certify a class of "[a]ll  
6 individuals and entities who purchased the Office 365 Business Premium plan through  
7 GoDaddy's website since November 13, 2014." (Doc. 86, pg. 2).

## 8 DISCUSSION

### 9 I. Rule 23 Requirements

10 A class may not be certified unless it meets each of the four requirements of Rule  
11 23(a), typically referred to as numerosity, commonality, typicality, and adequacy of  
12 representation. Fed. R. Civ. P. 23(a). In addition, a class action must satisfy at least one  
13 of the three requirements of Rule 23(b), one of which is "that the questions of law or fact  
14 common to class members predominate over any questions affecting only individual  
15 members, and that a class action is superior to other available methods for fairly and  
16 efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The party seeking  
17 certification bears the burden of demonstrating that it has met all of these requirements,  
18 and "the trial court must conduct a 'rigorous analysis'" to determine whether it had met  
19 that burden. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001)  
20 (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233) (9th Cir. 1996)).

### 21 II. Analysis

#### 22 A. Motion to Strike

23 In Plaintiff's Reply in Support of Plaintiff's Motion for Class Certification (Doc.  
24 116), Plaintiff attaches three exhibits consisting of expert reports. Exhibit 3 of Dwight  
25 Duncan calculates damages. Exhibit 8 of Ilan Srendi sets forth the different  
26 functionalities of Microsoft and GoDaddy's Office 365 Business Premium products.  
27 Exhibit 13 of Thomas Maronick discusses the monetary value consumers place on the  
28 Microsoft functionalities that are not present in the GoDaddy product. Plaintiff's Motion

1 for Class Certification (Doc. 86) contained declarations of all three experts, each  
2 asserting their qualifications and the work they sought to produce in their expert reports.  
3 Defendants move to strike the expert reports attached to Doc. 116 as consisting of new  
4 arguments and evidence, or for leave to file a surreply. In light of the Court’s denial of  
5 the Motion to Certify Class, the Motion to Strike is moot.

6 **B. Individual Questions Predominate, Preventing Certification Under**  
7 **Rule 23(b)(3)**

8 Plaintiffs have not shown predominance—that questions common to the class  
9 predominate over individual questions. Therefore, the Court declines to certify the Class.

10 **1. The Arizona Consumer Fraud Act**

11 The predominance inquiry necessarily requires an evaluation of the underlying  
12 cause of action. ACFA states that the “act, use or employment by any person of any  
13 deception, deceptive or unfair act or practice, fraud, false pretense, false promise,  
14 misrepresentation, or concealment, suppression or omission of any material fact with the  
15 intent that others rely on such concealment, suppression or omission, in connection with  
16 the sale or advertisement of any merchandise whether or not any person has in fact been  
17 misled, deceived or damaged thereby, is declared to be an unlawful practice.” Ariz. Rev.  
18 Stat. § 44-1522(A).

19 ACFA itself only provides for enforcement by the Arizona Attorney General, but  
20 the Arizona Supreme Court held that the statute also creates an implied private right of  
21 action. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974).  
22 (“Without effective private remedies the widespread economic losses that result from  
23 deceptive trade practices remain uncompensable and a private remedy is highly desirable  
24 in order to control fraud in the marketplace.”). A plaintiff must show that “(1) the  
25 defendant made a misrepresentation in violation of the Act, and (2) defendant’s conduct  
26 proximately caused plaintiff to suffer damages.” *Cheatham v. ADT Corp.*, 161 F.Supp.3d  
27 815, 825 (D. Ariz. 2016) (citing *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1008  
28 (Ariz. Ct. App. 1979)).

1                                   **2.       Reliance is an Element of an ACFA Claim**

2           Whether a party seeking class certification must prove individual reliance is a  
3 question of state law. *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1092 (9th  
4 Cir. 2010) (noting that the proper inquiry is “whether the law of [the state] requires a  
5 finding of individual reliance in the application of its consumer protection statutes”).  
6 ACFA states that an “omission of any material fact . . . whether or not any person has in  
7 fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.”  
8 Ariz. Rev. Stat. § 44-1522(A). Plaintiff asserts that this statutory language demonstrates  
9 that individualized reliance inquiries are not required to bring a private right of action  
10 under ACFA. But, such an argument has been long and consistently rejected by Arizona  
11 courts. *See, e.g., Peery v. Hansen*, 585 P.2d 574, 577 (Ariz. Ct. App. 1978) (“It is clear  
12 that before a private party may exert a claim under the statute, he must have been  
13 damaged by the prohibited practice. A prerequisite to such damages is reliance on the  
14 unlawful acts.”); *Parks*, 591 P.2d at 1008 (“For false advertisement to cause the injury,  
15 the hearer must actually rely on the advertisement; unlike common law fraud, this  
16 reliance need not be reasonable.”); *Kuehn v. Stanley*, 91 P.3d 346, 351 (Ariz. Ct. App.  
17 2004) (noting that “reliance is a required element under Arizona’s consumer fraud  
18 statute” but it need not be reasonable). The Arizona Supreme Court has never taken up  
19 this precise question, but it has left the Court of Appeals’ requirement for individual  
20 reliance under a private right of action undisturbed for forty years. It was not improper  
21 for the Arizona courts in finding a private right of action in the statute to require as a  
22 condition of such an action that a Plaintiff rely on the misleading advertisement to her or  
23 his detriment before obtaining an individual recovery.

24                                   **3.       A Presumption of Reliance is Inappropriate**

25           To the extent that reliance is an element, it cannot be presumed on a class-wide  
26 basis—at least based on the facts of this case. Even assuming that there might be an  
27 omissions case in which it was appropriate to adopt a presumption of reliance, this is not  
28 such a case. This case does not involve a single product with set functionalities in which

1 GoDaddy has marketed the product absent some of those functionalities without  
2 disclosing as much. It involves separate versions of a product with the same name that  
3 has been customized for different users and contains somewhat different functionalities.  
4 Plaintiff presumably purchased GoDaddy's Office 365 Business Premium because of his  
5 prior experience with Microsoft's Office 365 Business Premium.<sup>2</sup> In essence, Plaintiff  
6 thought that when he purchased GoDaddy's product he was purchasing the same  
7 Microsoft product he had used in the past. However, other purchasers may not have made  
8 the choice to buy GoDaddy's product with the same knowledge. Some purchasers may  
9 have bought the GoDaddy Business Premium precisely because it offers a simplified user  
10 interface and/or Microsoft Access. Other purchasers may have had no knowledge of the  
11 differences between GoDaddy and Microsoft; rather, they saw GoDaddy's  
12 advertisements and product and were motivated to purchase it on that information for the  
13 price set by GoDaddy.

14 Presumably, in an attempt to alleviate this difficulty, Plaintiff proposes two  
15 methods of calculating damages. In the "consideration paid" model, Plaintiff proposes  
16 that that class members would recover all money paid to GoDaddy. In the "discount"  
17 model, Plaintiff proposes that class members would recover the consideration paid minus  
18 the actual value of the allegedly inferior product. Plaintiff retained an expert to calculate  
19 the value of the allegedly inferior GoDaddy Office 365 Business Premium. Both of  
20 Plaintiff's models, however, are not sufficient to avoid individualized inquiries.

21 A class member presumably could not qualify to be included in the "consideration  
22 paid" model, unless he or she could establish that in purchasing GoDaddy's version of  
23 Office 365, she or he relied on the assumption that it included the missing functionalities

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25 <sup>2</sup> Plaintiff states that he believed he was purchasing "Microsoft Office's Business  
26 Premium product—Office 365 Business Premium." (Doc. 104-1, pg. 105). At the time of  
27 purchasing, Plaintiff "knew what Microsoft Office Business did, and [ ] knew that  
28 Microsoft Office Business Premium was a superset of Microsoft Business." (*Id.* at pg.  
109). Plaintiff had done trial runs with Microsoft Business Premium before purchasing  
the GoDaddy version of Business Premium. (*Id.* at pg. 111). Plaintiff did not research the  
GoDaddy product because he "thought they [GoDaddy and Microsoft] were the same  
product." (*Id.* at pg. 114).

1 of Microsoft's version of Office 365. This would involve an individualized inquiry that  
2 would predominate.

3 Nor does Plaintiff's proposed "discount model" work to create a class-wide  
4 question. Plaintiffs' discount model aligns with the presumptions of reliance utilized by  
5 courts in many securities law cases. In *Affiliated Ute Citizens v. United States*, the  
6 Supreme Court created a presumption of reliance when there were omissions connected  
7 the sale of securities. 406 U.S. 128, 153–54 (1972). Later, the Court allowed for the  
8 fraud-on-the-market presumption of reliance,<sup>3</sup> available in both omissions and affirmative  
9 misrepresentations related to the sale of securities. *Basic Inc. v. Levinson*, 485 U.S. 224,  
10 241–49 (1988). *See also Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) ("Thus,  
11 the presumption of reliance is available only when a plaintiff alleges that a defendant  
12 made material representations omissions *concerning a security that is actively traded in*  
13 *an 'efficient market.'*") (emphasis added). Of course, however, in such cases the Courts  
14 are dealing with the same security about which omissions were made. Here, however, as  
15 is detailed above, we do not have the same product; we have two different versions of a  
16 product bearing the same name.<sup>4</sup> The set of functionalities belonging to one identically  
17 named product may or may not have been more valuable than the other, but unlike the  
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19 <sup>3</sup> This presumption "is based on the hypothesis that, in an open and developed  
20 securities market, the price of a company's stock is determined by the available material  
21 information regarding the company and its business . . . Misleading statements will  
therefore defraud purchasers of stock even if the purchasers do not directly rely on the  
misstatement." *Basic Inc. v. Levinson*, 485 U.S. 224, 241–42 (1988) (citations omitted).

22 <sup>4</sup> Additionally, the securities context is a unique one in which legislation has been  
23 passed with a "fundamental purpose . . . to substitute a philosophy of full disclosure for  
the philosophy of caveat emptor." *Affiliated Ute*, 406 U.S. at 151 (quoting *S.E.C. v.*  
24 *Capital Gains Research Bureau*, 375 U.S. 480, 186 (1963)). *See also Stratton v.*  
25 *American Medical Security, Inc.*, 266 F.R.D. 340, 349 ("Courts rarely presume reliance  
outside of the securities fraud context."). Plaintiffs cite to no Arizona cases suggesting  
26 that such an approach has been extended to cases involving the purchase of consumer  
goods. An Arizona court did recognize a fraud-on-the-market presumption under ACFA  
27 in *Persky v. Turley*, Nos. CV 88-1830-PHX-SMM, CV 88-2089-PHX-SMM (D. Ariz.,  
filed Dec. 19, 1991). But *Persky* is distinguishable: it was related to stock purchases,  
where the fraud-on-the-market presumption of reliance is common.

1 market-value presumption available in stock purchases, one cannot assume that the  
2 failure to disclose the difference in functionalities would affect the price at which one of  
3 the two differing products with the same name was sold. Different information about the  
4 two different products was already in the market. The presumptions of reliance available  
5 in the securities context are not suited to such facts as are present in this case.

6 Further, as structured, Plaintiff's discount model only attempts to measure the loss  
7 in value to GoDaddy's product absent the functionality contained in the Microsoft  
8 product even if the consumer purchased the product for that separate functionality or was  
9 not aware of the difference. But, even assuming that the functionalities missing from  
10 GoDaddy's product cause a decrease in the product's value, the model makes no attempt  
11 to calculate the additions in value that may result to class members by GoDaddy's  
12 simplified design functions or separate functionalities. Such a value could equal the lost  
13 value from the missing functionalities, resulting in no damage to consumers. Or, their  
14 value could lessen the delta between GoDaddy's price and the alleged true value of the  
15 product. Plaintiff's proposed models, therefore, fail to account for all the variations  
16 between the GoDaddy and Microsoft products. This is a particular problem given that  
17 there are some consumers who may have sought out GoDaddy's product because of its  
18 simplicity and its inclusion of Microsoft Access. Determining who these consumers are  
19 and how their damages vary from other consumers would require individualized  
20 assessments.

21 To the extent that Plaintiffs have attempted to account for this by certifying a class  
22 of only those persons who have purchased from GoDaddy's website (which appears to be  
23 an attempt to eliminate most purchasers who may have been given individual disclosures  
24 of the different functionalities), that limitation does nothing to identify whether the  
25 putative class member relied on the presence of the "Microsoft" functionality in question,  
26 nor does it evaluate the value to the purchaser of the separate GoDaddy functionalities.

27 State courts have already extended the scope of the ACFA in recognizing a private  
28 right of action thereunder. In doing so, they have uniformly required a demonstration of



1 actual reliance. This Court will not eliminate that state law requirement so as to facilitate  
2 class treatment of an omissions claim in this context. The facts of this case do not allow  
3 for effective class treatment due to the predominance of individualized inquiries.

4 **C. Plaintiff's Grievances Are Not Common or Typical to the Class**

5 Rule 23(a)'s typicality requirement tests "whether other [class] members have the  
6 same or similar injury, whether the action is based on conduct which is not unique to the  
7 named plaintiffs, and whether other class members have been injured by the same course  
8 of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting  
9 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). As discussed above,  
10 Plaintiff appears to have purchased GoDaddy's Office 365 Business Premium because of  
11 his prior experience with Microsoft's Office 365 Business Premium. Other purchasers  
12 may not have made the choice to buy GoDaddy's product with the same knowledge.  
13 Plaintiff's grievance with GoDaddy's package is not necessarily typical of the grievances  
14 of absent class members. Other class members may not have suffered the same injury as  
15 Plaintiff, and determining which class member did suffer a similar injury would require  
16 individualized determinations.

17 Further, plaintiffs seeking to certify a class must show that "there are questions of  
18 law or fact common to the class." Fed. R. Civ. P. 23(a)(2). However, because "any  
19 competently crafted class complaint literally raises common questions," it is not  
20 sufficient for a plaintiff to simply identify any question that pertains to the whole class.  
21 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (citations omitted). Instead,  
22 "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered  
23 the same injury." *Id.* at 349–50 (citations omitted). Claims must "depend on a common  
24 contention . . . that is capable of classwide resolution." *Id.* at 350. More than presenting a  
25 common question, it is necessary to show that a "classwide proceeding [can] generate  
26 common answers apt to drive the resolution of the litigation." *Id.* (citations omitted). In  
27 this case, Plaintiff asserts two common questions: (1) whether GoDaddy's Office 365  
28 Business Premium fails to provide certain functionalities present in the Microsoft

1 product; and (2) whether GoDaddy fails to disclose the lack of functionality. Answering  
2 these questions, however, does not drive resolution of the litigation. As discussed above,  
3 ACFA requires consumers to show reliance and injury. Plaintiff has identified questions  
4 common to the class. But given the underlying statute and cause of action, these  
5 questions are insufficient to resolve the question of whether GoDaddy violated ACFA.

### 6 **CONCLUSION**

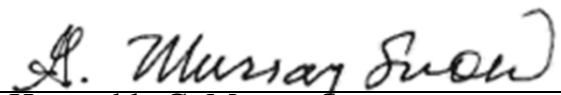
7 Individual questions predominate in this putative class action. In Arizona, reliance  
8 is an element of an ACFA claim. A private litigant bringing an ACFA claim is not  
9 entitled to a presumption of reliance based on these facts. Therefore, questions of whether  
10 a particular class member relied on the omission are individualized questions that would  
11 predominate. Plaintiff's motion to certify a class is denied.

12 **IT IS THEREFORE ORDERED** that the Motion to Certify Class of Plaintiff  
13 Ventures Edge Legal, PLLC (Doc. 86) is denied.

14 **IT IS FURTHER ORDERED** that the Motion to Seal of Plaintiff Ventures Edge  
15 Legal, PLLC (Doc. 117) is granted. The Clerk of Court is directed to file the lodged  
16 Exhibit (Doc. 118) under seal.

17 **IT IS FURTHER ORDERED** finding the Motion to Strike of Defendant  
18 GoDaddy.com, LLC (Doc. 123) moot.

19 **Dated this 30th day of January, 2018.**

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21   
22 Honorable G. Murray Snow  
23 United States District Judge  
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